ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

WEDNESDAY, SEPTEMBER 3, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 2 o'clock p. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman) and Chamberlain.

Senator WARREN. I may say, before proceeding with this hearing, that the other member of the subcommittee, Mr. Lenroot, is engaged in the debate now going on in the Senate on the oil-land leasing bill, and asked us to proceed without him, saying that he would come in if he could later on. We have with us to-day Maj. Gen. O'Ryan, and we will hear him now.

STATEMENT OF MAJ. GEN. JOHN F. O'RYAN, COMMANDING THE NEW YORK NATIONAL GUARD DIVISION, FORMERLY THE TWENTY-SEVENTH DIVISION.

Senator WARREN. Gen. O'Ryan, we have before the Committee on Military Affairs of the Senate the so-called Chamberlain bill, which provides for an entire rearrangement of the Articles of War, and we wish to have you tell us, after your experience in France and your subsequent service as a member of a special War Department board, what you consider necessary in the way of a change in the Articles of War as they stand to-day, with reference, as you go along, to the bill now before the Senate.

Gen. O'RYAN. My views are contained in the report of the so-called Kernan Board, a copy of which report I think your committee has. This report really consists of two parts. The first part is a general discussion of the subject, while the second part takes up in detail, article after article, the so-called Articles of War.

Under each numbered article we have set forth the article of war as it exists at the present time and the article of war as we propose it, and under each of the articles so arranged we have set forth comment, giving the reasons for the changes proposed; or, where changes were not suggested, why we think the article should remain unamended.

The only thing I think I can add, in a general way, to the general statement which constitutes part 1 of the report, is a view of the entire subject based not only upon study, but more particularly upon observations of discipline, or rather observations affecting the subject of discipline, made during the war.

I think that by those who were distant from the atmosphere of battle, perhaps too much stress has been laid upon the importance of the procedure of military courts. The object of courts in an army, especially during time of war, is mainly to deter the mass of the soldiers from the commission of offenses which have brought some of the soldiers to trial. I think, to appreciate the importance of this subject, it is necessary to reflect upon the influences which determine the conduct of soldiers in battle. These influences are the hope of reward, the stimulation of emotions of patriotism, pride, gang spirit, dependability of character; but underneath all of those influences there must be the strong arm of compulsion to move an element which exists in every army. Fortunately, I think that the American Army had but a small percentage of men who might be classed as undependable in battle; but nevertheless every army possesses such an element, in the same way that every army possesses an element of men who are hardly human in relation to their bravery and recklessness. The mass of soldiers are the subjects of ready leading, either in one direction or the other, and the skill of the commander is largely determined by the manner in which he suppresses one element and exploits the influence of the other.

In this work of leadership it is necessary that the commander should have at his command a summary procedure to bring to sharp accountability those who willfully or negligently fail in their duty in times of critical importance. I say that this point, I think, is so important, and it is so peculiar to the conditions which affect an army in the field that it is one apt to be overlooked in time of peace.

Senator WARREN. Without wishing to interrupt, let me say that I should be glad if, before you finish, you would portray, in your own good way, the differences in time of peace and in time of war.

Gen. O'RYAN. In attempting to answer the Senator's question, it is with diffidence, I think, that any commander will speak of that element of his command which is constituted of the men who are organically undependable. Nevertheless, they exist in all armies, and we had them in the American Expeditionary Forces.

In considering the conduct of such men, I think that form of misdemeanor which affected the discipline and morale of the Army more than any other was the conduct which prompted the soldier to quit in action, to shirk his battle duties, or in anticipation of battle to leave his command, not for the purpose of deserting the Army but for the purpose of avoiding battle by going absent without leave. In other words, we found that a man who went absent without leave in anticipation of a battle was as much a demoralizing influence upon the Army as was the man who actually deserted.

Now, if the punishment of these men who went absent without leave were dependent upon a court bound by such procedure as is proposed in the new bill, the delinquents would, I think, in many cases go without punishment, for the reason that during the battle period it would be impracticable—physically impracticable—for those concerned in the convening and conduct of courts-martial to provide the court prescribed and to carry out the procedure proposed.

The one thing, I think, that affects an army in battle more than anything else is fatigue, loss of sleep, and the fewer unnecessary du-

ties there are imposed upon officers and men the more will the vigor and energy of the force be conserved. By that I mean that if officers during battle are to be required to constitute courts-martial for the purpose of trying men, the procedure should be as simple and as expeditious as practicable, so that they may be promptly relieved of duty and returned to their normal functions.

My recollection is that the proposed bill provides, in effect, that the court shall constitute a jury, while the staff judge advocate plays the rôle of judge.

It is also provided, I think, that enlisted men shall constitute a part of the membership of the court. In our report we have covered our views concerning this proposal, but in a general way I think that the objections to the proposed system are based upon the military man's knowledge of the need for summary action in disposing of cases based upon negligence and willfulness under battle conditions.

Senator WARREN. With relation to private soldiers, enlisted men, serving as members of courts in trials of enlisted men and noncommissioned officers, what is your judgment as to the views of the men themselves, as to whether it would be desired by the enlisted force, or whether they would prefer to have it the way it is at present, being tried by all commissioned officers?

Gen. O'RYAN. I think I can answer that; I know I can answer that positively in my own division. The men were satisfied with the system of courts-martial as practiced in the division, and I have a strong impression that the same view existed throughout the Guard divisions and the Regular Army divisions. In other words, that the men would not care for and do not seek the opportunity to serve on courts.

The phase of this subject that appealed to me most is this: Membership on a court implies that the officer detailed possesses experience, judgment, impartiality, and knowledge of the requirements and needs of the military service at the time. Now, under our democratic system it is the fact that in war our officers come from the ranks, and necessarily they are those in the ranks, or were those in the ranks, most fitted by education and other qualifications to become officers. Hence, if we put enlisted men on courts, we go into that class of the Army—knowingly go into it—where are to be found those least qualified in relation to these qualities to perform the functions of officers detailed to courts.

Then, I think, too, were enlisted men to be detailed as members of courts, it would be unfortunate in a disciplinary way. I think that their comrades would ask them how they and how the officers on the court voted, and I do not think that would be in the interest of discipline.

Senator WARREN. Would the likes and dislikes of the enlisted men, as they associate together, unduly influence, do you think, their judgment while serving on a court?

Gen. O'RYAN. Well, Senator, I think that would vary materially. In time of war, particularly, there is such a large percentage of enlisted men with a high sense of responsibility that as to those men I am quite sure they would not be influenced.

Senator WARREN. I am speaking, of course, of what is to come rather more than of what is past.

Gen. O'RYAN. Oh, yes.

Senator WARREN. That is to say, I am speaking of our Army as it will be constituted; and, as we hope that in time of peace we shall always be prepared for war, I am speaking of our Army, as it will be in peace.

Gen. O'RYAN. I think it can be fairly stated that the danger would be greater in relation to enlisted men than it would be in relation to officers. Their mean period of service is much shorter; their experience is less. Their characters are less developed as the result of less training, less years of life, less experience, and less education.

Senator WARREN. Has your division, for instance, experienced any difficulty, and if so how much difficulty, in procuring officers for service on courts-martial who are qualified? Has there been a large percentage or a small percentage of unfit officers charged with the duty of serving on courts-martial—who have been unduly severe, and so forth, or inefficient? Have you been compelled to take any large percentage from those coming in from civil life, among whom there have been officers by education and practice unfit for that service? What is your idea about that? Is there a large percentage or not, and is that cared for generally in the selection of courts?

Gen. O'RYAN. Court-martial work, I think, is considered by the average officer as disagreeable work. That is the first thing.

The next thing is that many officers consider it of less importance than the work that they happen to be doing, and based rather upon the second idea than the first, do many officers apply informally to the judge advocate to be taken off the list of officers available for court-martial work. Naturally, to some extent, these requests influence the judge advocate in making his recommendations to the chief of staff. I should say that a very small percentage of officers were unfit or undesirable for this service. When they were found to be unsuited, it was the practice for the trial judge advocate or for the president of the court to report the fact to the chief of staff and recommend that the officer in question be relieved.

Senator WARREN. You speak of the chief of staff. You mean the chief of staff of the division?

Gen. O'RYAN. Of the division; yes, sir.

Senator WARREN. Or of the brigade?

Gen. O'RYAN. Of the division. Now, getting right down to the details of the thing, my practice was this. I was concerned with securing for each court a president of the court whom I knew personally to be an officer of responsibility, who would supervise the administration of justice, who would permit no wasting of time, and who is known to be a good soldier. Occasionally our situation was such that I found it to be unwise to appoint as the president of a court the officer who was my first choice, and I thereupon took another. So I would say that all of the courts in our division were well administered, largely as the result of the good teamwork between two very efficient men, one the president of the court and the other the trial judge advocate.

Senator WARREN. General, I do not want to interrupt the even course of your testimony, but let me say this: There has been

a great deal of complaint that court-martial proceedings and findings have been very strict, and of course there have been some instances cited before the Committee on Military Afffairs as a whole, and elsewhere, that have seemed absolutely inhuman. I think that we should like to know from you what your observation has been, not only in your division but otherwise, and whether those instances are exceptions and whether they are extremely rare, or whether they are common occurrences; so as one may say, to get down to practical business. That, I think, is what the subcommittee and the general Committee of Military Affairs would like to know. They would like to know what of these reports we can accept as being of general application and as indicating the general attitude of Army officers on these courts, and whether, taking it by and large, the men of our Army as a whole have suffered tremendously—more than the exigencies of the case would require.

Of course, as to this matter of enlisted men serving on courts, which is a matter on which there is such strong division of opinion with people who are advocating change, I would also like, somewhere in your remarks, to have you state what your opinion is and what would be your advice about some final court, you might say outside the Army, a civil court, or if within the Army, appointed from civil life and appointed for that purpose and no other. You catch my idea, do you?

Gen. O'RYAN. Yes, sir; I think so. When our troops were mobilized and the general plan for the organization of the big Army was understood, I think that a great many officers were rather appalled by the prospect of having so many men without military training brought into the service; that is to say, they were appalled by the prospect of handling them, disciplining them, and training them, and I think that many of them, from what I have heard in conversation with them at the time and since, made up their minds that in relation to offenses committed by those men, after warning and after a reasonable degree of training, they would send them before a court that would punish them in a way that would terrorize them—I use the word, I think, advisedly—or not so much terrorize them as terrorize the rest of the men on duty at that camp; at the same time, however, recognizing the fact that these sentences would perhaps be modified by the division commanders, or where they were not, or where they were attempted to be carried out in full, would after a reasonable time had elapsed, or perhaps after the conclusion of the war, be in part or wholly remitted. I think that the officers who served on military courts, and the division commanders who reviewed the convictions which resulted in these long sentences, all understood that no mature men in or out of the Army would seriously expect these sentences to be carried out; but that the men who constituted the Army were young, many of them unsophisticated in regard to military matters at least, that they did not know very much, if anything, about military courts or military justice; that they had an idea that the Army in time of war punished practically as it pleased. When stern sentences were handed out, I think that they had a very beneficial effect in those cases where the sentence was not so extraordinarily severe as to give the impression that it was unjust or perhaps even inhuman.

Senator WARREN. You say, though, these cases all went to division commanders?

Gen. O'RYAN. Yes, sir; all cases within the division, of general courts-martial, had to be approved by the division commander.

Senator WARREN. All general courts-martial?

Gen. O'RYAN. Yes, sir. The point I am making is that I think the officers of all the divisions and commands in the Army who were parties to the imposition of these long sentences had no idea that they would be carried out completely. The object was to give an example of the severity of military courts and military discipline to the newcomers, for the purpose of exercising a strong deterrent influence upon them.

Senator WARREN. You mean by conveying the impression that such sentences might at any time be declared, and that any of them for similar offenses might be similarly punished at any time thereafter?

Gen. O'RYAN. Yes.

Senator WARREN. I noticed from an examination of your report that it touched slightly upon the matter of the difference between a court-martial and a civil court of justice in that in the civil court all the evidence and surrounding circumstances were considered, and all the feeling in regard to the case was as to the particular offense of that particular occasion.

Gen. O'RYAN. Yes.

Senator WARREN. Whereas—and I think a member of your committee rather supported the idea—in court-martial cases and in war times there might be a difference, and sometimes almost an extreme difference, in the punishment inflicted for the same crime or misdemeanor, because of former indiscretions or former disobedience of the parties being tried. Perhaps you can tell us more about that. In other words, the character of the man and the character of his work that has been done before are in the minds of the court, as well as, in particular, that he is guilty of the offense in the charge.

Gen. O'RYAN. As to how much the character of the accused and his past performances affect the consideration by the court?

Senator WARREN. Yes. His character and his performances in the past.

Gen. O'RYAN. Yes. Now, I find it difficult, Senator, to answer that question, because throughout the war I, naturally, being a division commander, never served on a court. My functions were to review the findings of the courts. Applying that question to myself, I always, in reviewing the findings of a court, had before me the record of the soldier from the time he entered the service, and considered that.

Senator WARREN. You reviewed the entire record of the soldier?

Gen. O'RYAN. As well as the typewritten record, the stenographic notes, of the testimony.

We made, in our report, one point that I think is important. I think it was Gen. Ansell who called attention to the great dissimilarity of sentences for the same offense in our Army, his argument being, apparently, if for example you justify in one division a three months' sentence for an offense, then you can not justify a 30-year sentence for the identical offense in another division; one is right and the other is wrong. I think we pointed out—and I am still

of the same opinion—that that argument is not sound, and it illustrates the purpose of military courts. Their function is more to deter others in relation to problems that affect the particular division. For example, I can well conceive of justice being done in two cases in one of which a soldier in one division is sentenced to six months' confinement for an offense and in another division another soldier gets 10 years for the identical offense. I am of that opinion because I can conceive that in the first division mentioned the soldier has been guilty of an offense which constitutes, in relation to the discipline of that command, no problem whatever. For example, in that division the record may show that out of 25,000 men only one-half of 1 per cent have gone absent without leave during a long period of battle. The soldier charged with the commission of that offense puts in his plea. He has had a good record, and the court in determining his sentence is in that particular case uninfluenced by any problems affecting this division in relation to its discipline and morale. It is for the court a matter entirely of exact justice between the military law of the country and the individual soldier concerned, and so they take into consideration his former record, the character of the offense, the fact that operations have not been influenced by absences of personnel. They warn him and sentence him to six months' confinement.

In the other division, however, instead of one-half of 1 per cent only being absent without leave during a long battle period, we will assume that 7 per cent of the men were absent without leave. We will assume that in a previous battle 4 per cent were absent without leave and in a battle before that 3 per cent were absent without leave. In other words, the curse of abstenteeism has been growing in that division. After the last battle perhaps the division commander has warned every man in his division that examples would be made of the next offenders. Now, a man in this division comes up for trial, and although the cause of his absence is almost identical with that in the case of the other soldier of another division, yet this court may, in the execution of justice toward the soldier and toward the Army as well in that important time, sentence that man to 10 years' confinement for his very serious offense, leaving it to some higher authority at some subsequent time, if the interests of the Army make it desirable, to remit the whole or a part of that sentence.

I think that those examples illustrate conditions that exist in an army and do not exist so forcibly, at least, in relation to the administration of criminal law in civil life.

Senator WARREN. That explanation brings out further the matter that I alluded to that is in the report. Without this remission of sentences and the shortening of the time, what percentage, approximately, generally speaking, not of your division but so far as your observation goes—we will take matters in France in the Army that was there for action—what percentage have had clemency in the way of shortening of time or remission of sentence? That is, is it a large percentage or only trifling—I mean over there, before coming back to this side?

Gen. O'RYAN. I had a rather peculiar condition in my division. I early realized the inadequacy of our courts—that is, our existing courts—in relation to the offense of absenteeism during operations. I did not wait to have conditions develop which might be difficult to

cope with later. We handled these men by trying them summarily and sentencing them to very short terms, but these terms to be served by confinement with the organizations at hard labor, and the hard labor to be performed—and the division was notified of the character of that labor—in the front line, and in the way of working parties against the enemy. These men began to get killed and wounded, and the result was that it stopped absence without leave during battle periods.

Senator WARREN. You put them in to perform labor where they had to submit themselves to the same risk of danger from the enemy as if they were in the ranks?

Gen. O'RYAN. Yes, they did; and they had more risk, because they were kept at it after their own outfit was relieved.

Senator WARREN. Your division was a fully formed division before you left here—that is, from your own State—was it not?

Gen. O'RYAN. Yes, sir.

Senator WARREN. And it was what might be termed a National-Guard division entire?

Gen. O'RAN. Yes, sir.

Senator WARREN. Was there any great percentage added of drafted men?

Gen. O'RYAN. No, sir; we received no replacements until after the armistice, until after the fighting was over.

Senator WARREN. All of your maneuvers and battles were with the division formed here from the National Guard, and it continued as such with the National Guard officers, altogether, did it?

Gen. O'RYAN. No; we had one small draft of about several hundred men that we received just as we left for France. They were draft men received from Camp Upton, Long Island.

As to the officers, they were, in the main, officers who had been in the division—that is, in the New York division—for years; the field officers and most of the company officers. In relation to the lieutenants, higher authority transferred some lieutenants from other divisions, and in cases where lieutenants were promoted in our division we received some lieutenants from other divisions or from training camps.

Senator WARREN. Did you have, under the old law, any Regular Army officers sent to the division, to conform to the requirement of the laws—that is, the laws that we have had at times, and which I think exist now, do they not, Senator Chamberlain—that they must, in these National Guard organizations, have some officers of the Regular Army?

Senator CHAMBERLAIN. Yes; they are assigned for training.

Gen. O'RYAN. Do you mean the inspector-instructors that we have had in times of peace?

Senator WARREN. Yes; you had some of them, too.

Gen. O'RYAN. No; we had none after the mobilization in this war. We had no special instructors.

Senator WARREN. But you had had them before that?

Gen. O'RYAN. Yes; we had had Army officers on duty with us.

Senator WARREN. While this may not bear directly upon this question, yet we have so much said, and I might say so much evidence is undertaken to be presented, that I want to ask you as to whether

there are differences of control, or differences that make it desirable to change our laws because of the almost inherent differences that occur between the Regular Army and the National Guard and the drafted men—which, of course, all became the Army of the United States—as to matters of discipline?

Gen. O'RYAN. In reference to court-martial discipline?

Senator WARREN. Yes.

Gen. O'RYAN. No; I can think of nothing, really.

Senator WARREN. That is what I want to get now.

Gen. O'RYAN. There was no problem in our divsion. We had some Regular officers at times. I should say we had two or three. We had, perhaps, 100 Reserve Corps officers, and that number changed occasionally, there being sometimes more and sometimes less; but I do not believe the average officer in the division knew or cared whether a particular officer was regular or irregular or guard or Reserve Corps. There was no lack of harmony.

Senator WARREN. There were no differences?

Gen. O'RYAN. No. Harmony existed there.

Senator WARREN. After your observation of the other divisions—of course you may not want to speak of them, and so I will ask you generally——

Gen. O'RYAN. I can speak of the two American divisions that served throughout in the British area. That is, as to the Thirtieth American Division—in fact, I am quite sure of it from what I have heard—the same conditions existed in that division.

Senator WARREN. Who commanded that division?

Gen. O'RYAN. Gen. Lewis. Those two divisions were a part of the British Army from the time we got there until we left. We all wanted to be, of course, with the Americans in the American sector, but it fell to our lot to be sent there.

Senator WARREN. I suppose it was largely a matter of lot, was it not?

Gen. O'RYAN. Yes; I think it was so far as the American Army was concerned. We had 10 divisions up there, and Gen. Haig determined, as we hear it——

Senator WARREN. You had, of course, largely the advantage—your division did—of perfect formation at home, and a great amount of drill. I suppose you were considered as being more nearly ready for action.

Gen. O'RYAN. Yes; I think we heard authoritatively that Marshal Haig suggested that if eight divisions were to be taken away, they leave the Twenty-seventh and the Thirtieth Divisions, which was agreed to.

Senator WARREN. I can understand how that might be.

Gen. O'RYAN. We had just returned from the Mexican border, shortly before that, where we had been kept together as a division through a period of months.

Senator WARREN. Has anything occurred to you since the so-called Kernan report was made that would make you like to differ from or add to or take from that report—any point that was not considered then that you have had occasion to consider since, with reference to military justice?

Gen. O'RYAN. There was one thing. It really has nothing to do with the articles governing the system of military procedure. That relates to article 105. It relates to injuries to person or property. I might say, in relation to this report, that as the committee probably knows, the members of the board were unanimous in their views and recommendations, except as to two or three small details. In relation to this particular section I dissented from the majority opinion, and the comment in support of my dissent is set forth on page 37 of the report, and relates to article 105; but it has nothing to do with courts.

It relates to the appointment of boards to assess, upon officers and soldiers and organizations, damages claimed to have been committed by them and which affected the property or rights of citizens.

Senator WARREN. There are one or two cases which I do not have in mind, but one I remember that came back here that created a good deal of—well, I guess I can say scandal. As we got it from the newspapers, that seemed to carry a good deal of injustice to the men of the organization; and then again, it was claimed that there was injustice on the other side. Have there been numerous cases during the war of marauding or creating damages, sometimes unnecessarily?

Gen. O'RYAN. I think that the percentage was very small; but the Army was so large that a small percentage would aggregate——

Senator WARREN. An enormous amount of damages?

Gen. O'RYAN. Yes; I think so.

Senator WARREN. I take it from what you say, and from your report, that it is unnecessary to ask you, and yet I will ask you, if you do not consider it necessary that there should be legislation concerning these articles of war?

Gen. O'RYAN. Oh, yes, decidedly; and I think that the changes should be along the lines—naturally I think so—of those recommended by the board.

Senator CHAMBERLAIN. May I ask him some questions now?

Senator WARREN. Yes.

Senator CHAMBERLAIN. General, as commander of the division, of course you did not sit in any of these court-martial cases, but will you please state, now, what your functions were with reference to the several kinds of courts, whether summary courts or special courts or general courts-martial? What was your function as the commander of a division?

Gen. O'RYAN. My functions were to read the testimony adduced upon the trial of officers and men tried by general courts-martial, to review the findings and sentence, and concur or disagree, approve or disapprove, those findings, and to set forth the action at the end of the record of the trial and forward it to the office of the commander in chief.

Senator CHAMBERLAIN. That is, the commander of the expeditionary forces?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. And through him these were forwarded here to Washington?

Gen. O'RYAN. I believe so.

Senator CHAMBERLAIN. What courts did you appoint?

Gen. O'RYAN. I appointed all the general courts for my division.

Senator CHAMBERLAIN. Regimental courts—did you appoint the general courts?

Gen. O'RYAN. I appointed all the general courts-martial of the division.

Senator CHAMBERLAIN. Did you appoint the special and the summary courts, too?

Gen. O'RYAN. No, sir.

Senator CHAMBERLAIN. So that there did not come to your attention the findings of either the summary courts or the special courts?

Gen. O'RYAN. Except that I kept track of them, more in the form of tables or statistics and explanatory reports made by my division judge advocate, who did keep such records.

Senator CHAMBERLAIN. You did appoint the judge advocate of the general court-martial?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. And the judge advocate of the special court?

Gen. O'RYAN. Yes, sir; no, the appointing power did.

Senator CHAMBERLAIN. Who was the appointing power?

Gen. O'RYAN. Usually it was a brigade commander. It was the commanding officer of a separate organization; and, as the division was necessarily under a billeting system more or less scattered throughout the various villages, we would group several villages under the charge of a brigadier general and——

Senator CHAMBERLAIN. And he appointed the special courts?

Gen. O'RYAN. Yes; but not the general courts.

Senator CHAMBERLAIN. And the summary courts were appointed by him or some subordinate officer of his?

Gen. O'RYAN. Yes, sir. He usually decentralized the courts and permitted them to be appointed by the local officers.

Senator CHAMBERLAIN. Can you tell me how many sentences of general courts-martial you revised and went over and approved or disapproved?

Mr. O'RYAN. During what period?

Senator CHAMBERLAIN. During the period over there?

Gen. O'RYAN. The average, I should say, was four a week; 16 to 20 a month; perhaps 100 to 120 general court cases during the period we were abroad.

Senator CHAMBERLAIN. Did you go over them all?

Gen. O'RYAN. Personally, every one of them.

Senator CHAMBERLAIN. How many did you disapprove, where there was a conviction?

Gen. O'RYAN. Perhaps three to five.

Senator CHAMBERLAIN. And the balance were all approved?

Gen. O'RYAN. No, sir; the balance were frequently modified.

Senator CHAMBERLAIN. That is, you mean modifying the punishment?

Gen. O'RYAN. Modifying the punishment. I should say that perhaps one-third the punishments were modified, and of two-thirds approved. That is all from recollection.

Senator CHAMBERLAIN. Yes, certainly. I only want the general proposition.

How many cases of general courts-martial were there where there was a finding of not guilty, in which you set aside the finding and ordered a retrial?

Gen. O'RYAN. Well, if there was a finding of not guilty, I could not order a new trial, under the laws that exist now.

Senator CHAMBERLAIN. You did not reconvene the court?

Gen. O'RYAN. No, sir. Oh, I see what you mean. We do not call that ordering a new trial.

Senator CHAMBERLAIN. You order the court to reconvene?

Gen. O'RYAN. Yes; to reconvene.

Senator CHAMBERLAIN. It is, in effect, that?

Gen. O'RYAN. Yes, it is.

Senator CHAMBERLAIN. In how many cases did you order the court to reconvene where there had been sentences of not guilty, either by the specifications or the charges?

Gen. O'RYAN. In perhaps three or four cases.

Senator CHAMBERLAIN. And in those cases were convictions returned by the court?

Gen. O'RYAN. I think—I am not quite certain that—my recollection is that—in our division where that has been done, the percentage is about half and half. In other words, in about one-half of the cases so sent back, the court refuses to modify its action. I think that such cases are a little more than one-half. In a little than one-half of such cases, the court, on reconsidering, did modify its former findings.

Senator CHAMBERLAIN. What influenced your action in cases where you ordered the court to reconvene, where there had been a verdict of acquittal or a judgment of acquittal?

Gen. O'RYAN. I recall one case, for example, that happened at Camp Wadsworth, where an officer was accused of being drunk and creating a disturbance, and it resulted in his trial by a general court-martial. The finding of the court was that he was not guilty. I read the testimony. The testimony was conflicting, to some extent. Nevertheless, the great weight of evidence established the case, and I characterized the thing as a complete miscarriage of justice. I criticized, indirectly, the members of the court and sent it back and directed the court to reconvene and to reread the testimony and to reconsider the case. That was done and they sent it back with the same result, and I then confirmed the action of the court, stating, however, that it was not in accord with my own views. But I later found what actuated the court was this, that this officer had been in the service for a long number of years, that he had been a fairly efficient officer, that he had had some family trouble of some kind and acted in this outrageous way. They knew that we must make an example of any officer who acted that way, that he could not remain in the service, and it was stated by a member of the court that if the court would find this man not guilty so that he could, without that smirch on his reputation, return to his family, he would guarantee that this officer would resign. It was an arrangement that was entirely without any authority.

Senator CHAMBERLAIN. Did he resign?

Gen. O'RYAN. He did. He got out.

Senator WARREN. That is one of those cases in which the court took into consideration his prior actions and prior conduct, of course?

Gen. O'RYAN. Oh, yes; ves, sir.

Senator CHAMBERLAIN. Now, General, I want to get this down to the actual practice in the Army. Either the division commander or the commanding officer of a brigade, or even of a lower unit, appoints all of the courts?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Then does the commanding officer also appoint the judge advocate?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. And he appoints, as a matter of fact, the man who is to defend, usually appointing the man who is suggested by the defendant himself?

Gen. O'RYAN. Yes; suggested by the defendant himself.

Senator CHAMBERLAIN. But that is entirely within the power of the commanding officer?

Gen. O'RYAN. To deny or to authorize.

Senator CHAMBERLAIN. Yes. Now, when a judgment is found against a defendant, whether an enlisted man or a commissioned officer, in the due course it reaches the Judge Advocate General of the Army, does it not, here?

Gen. O'RYAN. The record does; yes, sir.

Senator CHAMBERLAIN. Is there any power between the commanding officer where the judgment is rendered and the department here, where there is power to revise or modify the judgment of a court-martial, except the commanding officer?

Gen. O'RYAN. That is all.

Senator CHAMBERLAIN. When it gets here—and here is where the line of difference comes between those who insist upon maintaining the present system and those who desire the modified system—under section 1199 of the Revised Statutes this language is used. I will not read it all. You are familiar with it?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. However, I would like to have it go into the record. I will ask the stenographer to insert it and I will not read it.

(Sec. 1199 of the Revised Statutes, above referred to, is here printed in the record as follows:)

SEC. 1199. The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army. The power to revise the proceedings of courts-martial conferred upon the Judge Advocate General by this section shall be exercised only for the correction of errors of law which have injuriously affected the substantial rights of an accused, and shall include—

(a) Power to disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when the record requires such finding;

(b) Power to disapprave the whole or any part of a sentence;

(c) Power, upon the disapproval of the whole of a sentence, to advise the proper convening or confirming authority of the further proceedings that may and should be had, if any. If upon revision, under this section, all the findings and the sentences be disapproved because of error of law in the proceed-

ings, the convening or confirming authority may lawfully order a new trial by another court-martial.

Sentences involving death, dismissal, or dishonorable discharge from the service shall not be executed pending revision. If in any case a sentence though valid shall appear upon revision to be unduly severe, the Judge Advocate General shall make a report and recommendation for clemency, with the reasons therefor, to the President or the military authority having power to remit or mitigate the punishment.

Senator CHAMBERLAIN. Under that provision which has just been inserted in the record the Judge Advocate General of the Army claims that under the power to receive and to revise there is no other power than an advisory power of the commanding officer.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Unless there is want of jurisdiction, or the court has been illegally constituted.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Do you agree with that?

Gen. O'RYAN. I agree with that as a proposition of law.

Senator CHAMBERLAIN. You agree to that construction of the statute?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Do you agree to the proposition that it is a wise construction of the statute?

Gen. O'RYAN. I think it is always wise to construe statutes in accordance with correct legal principles, and therefore I think it is a wise construction.

Senator CHAMBERLAIN. Surely.

Gen. O'RYAN. But I think that the result of that law, rather than the result of the interpretation, is unfortunate.

Senator CHAMBERLAIN. Well, now, that is what I am getting at. You think that is a proper construction of the law?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. It is the contention now of the Judge Advocate General of the Army and of a good many others that it is a proper construction.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. On the other hand, it is contended that under the power to revise the Judge Advocate General's office has to examine into the record and not only to advise the commanding officer but to reverse the judgment, if he sees fit, or to modify it.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Do you not think, if that construction could have been conscientiously placed upon the statute, it would have resulted in good?

Gen. O'RYAN. I think it would have resulted in good; yes.

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. But I think it would have resulted also in some conditions that would have been unfortunate in that it would vest in a staff officer of the War Department powers that are really judicial and executive; the powers, in other words, to be gleaned or to be gathered from the word " revise," if that is to be interpreted as meaning, as you have stated, to read the record, to reverse, to modify. Those are really powers that are judicial, but in executing them they become executive.

Senator CHAMBERLAIN. Yes; but the judge advocate general himself is a military man.

Gen. O'RYAN. He is a military man in the sense that he holds a military commission.

Senator CHAMBERLAIN. And within the Military Establishment.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. So that it would not be a decision of the case by a nonmilitary tribunal.

Gen. O'RYAN. No, sir; that is correct.

Senator CHAMBERLAIN. Now, you rather speak of this system of severe sentences as a system *in terrorem;* that is, a man is punished severely not so much possibly because his act calls for severe punishment, but in order to discipline the mass?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Under the construction of the statute for which I contend, that the power to revise gives the power to reverse or modify, the Judge Advocate General might have, within the law, revised and modified this sentence and removed the stigma of conviction, might he not?

Gen. O'RYAN. Under that construction; yes, sir.

Senator CHAMBERLAIN. Now, as it is, you take a young man convicted, whether he is a commissioned officer or an enlisted man he is severely punished, not because of the viciousness of the particular crime but to set an example. The judgment of conviction against him by a general court-martial is a punishment that can not be set aside. There is no way to get rid of the stigma of conviction except by the exercise of clemency.

Gen. O'RYAN. Unless the case is one where the court lacked jurisdiction or where its sentence was contrary to law.

Senator CHAMBERLAIN. Yes; of course, then, that removes the stigma. But in the greater number of cases there is only one tribunal to relieve, and that is the President.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. And that does not remove the stigma. That is simply mercy.

Gen. O'RYAN. But in these *in terrorem* cases, that would not result, because it is not the conviction that is set aside, but the severe sentence that is modified.

Senator CHAMBERLAIN. Are you not mistaken about that? We will take four cases that have been referred to in the press and by some witnesses, where four boys over in France were convicted under very extraordinary circumstances, two of them for sleeping on post, and the two others for disobedience of a command, and all four were sentenced to be shot. The record in those cases indicated that those boys had not had a fair trial. Probably two of them plead guilty; but there was no way in the world, under the construction of the Judge Advocate General, to revise, or to reverse, or to modify, or to change, or to set aside that conviction. Now, those boys were outlawed, under the strict military rule. The only way to reach that was through the clemency of the President. That does not remove the stigma of conviction.

Gen. O'RYAN. Yes; I see your point. What I intended to say was that in the vast majority of these cases that are criticized, the criti-

cism is based upon the extreme severity of the sentence, not upon the fact that the soldier was unjustly convicted.

In the cases you mention, perhaps the conviction itself was unjust, wholly aside from the severe sentences imposed.

Senator CHAMBERLAIN. But these sentences were all approved by the commanding officer; they were approved by the judge advocate, they were approved by the Chief of Staff; so that if the military rule had been strictly complied with, they would have been shot.

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Now, the President intervened by an act of clemency and remitted the penalty of death, but still that did not relieve them.

Gen. O'RYAN. Yes. I share your view about that, and I did on this board, and I think you will find in the report that the others were of the same opinion, and as the result of that, we seek, by what we have proposed in this report, to vest in the judge advocate, in terms that can not be questioned, this authority—of course it is in the name of the President—to do these things. I think if you will refer to the section, you will find it there.

Senator CHAMBERLAIN. Yes; I am glad to hear you say that, General. Now, the Judge Advocate General of the Army proposed an amendment to the Articles of War in January, 1918, before our committee, which vested that power in the President. That is substantially what you propose to do.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. But in the last analysis that power which is proposed to be vested in the President rests in military authorities below the President.

Gen. O'RYAN. As a result of routine practice?

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Because the President can not review these cases.

Gen. O'RYAN. He can not, personally.

Senator CHAMBERLAIN. No; so that in the last analysis the President is governed by his military adviser, who is the Chief of Staff. So that, in the last analysis, the Chief of Staff is the man who acts. In the very nature of things, the President can not do it. Is not that true?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Now, let us get back to the Articles of War. But before I reach that: Do you not think that there ought to be somebody somewhere along the line, from the time of the trial until the final lodgment of the case here in Washington, who can represent the legal aspect of it in an advisory capacity to the different courts?

Gen. O'RYAN. Yes; I think there should be in relation to sentences that sufficiently affect the material rights of the accused. But, while I am making that statement, I have in mind the division commander in the mud and the rain, with his men, getting a little bit tired of war, a percentage of them showing a willingness to follow the line of least resistance; I have in mind that commander, seeing the necessity of driving their noses against the grindstone and making a little example here and there in addition to all the other stimulating things

he is doing; I see the necessity of that officer being able to take these men and try them, and administer these punishments.

Senator CHAMBERLAIN. But you would want it done according to law?

Gen. O'RYAN. Oh, yes; certainly, I want it done according to whatever law is provided. But I can not help but view with alarm the prospect of having every one of those cases, before they are finally decided, going back through various stages to Washington here, to have some board review them.

Senator CHAMBERLAIN. I agree with you as to that, but that would not prevent the judge advocate saying to a court-martial, "Gentlemen, you are proceeding without any law. You have no authority to do this." Do you not think there should be some man with power to give that advice, right in the field, if necessary?

Gen. O'RYAN. I think we have that person in the trained law adviser of each division; that is, the staff judge advocate, who is a major or a colonel, who is away from the scenes that I have described or referred to, and whose specialty is law.

Senator CHAMBERLAIN. Yes, General; but he has no power to act in the matter.

Gen. O'RYAN. He has no executory power. His power is that of an adviser. But might I interject here a thought that I think has a great bearing upon this matter, and that is, I find in discussing this subject with those who disagree, that there exists an attitude of mind in regard to a military man, that conceives that the officer is by virtue of his office in some way a man whom it is undesirable to vest with this character of authority in relation to his own men; that the men would seem to need protection from the officer. Now, I can tell you frankly I have a great regard for the men and their rights. I really have seen very little justification for that attitude. I think that any man fit to command a division appreciates even in a selfish way, aside from any other motive, that his success will be very largely dependent upon his men and their ability and their feeling toward him. If he is unjust toward them, they will not do things for him that he demands that they shall do, and some of the things he must do for them is to see that justice is done them in relation to discipline, and that they are fed and clothed. There is no man more concerned with these things than the division commander.

Senator CHAMBERLAIN. As a rule, I think that is probably true; but if it is possible that there should be individual exceptions, it is unfortunate.

Gen. O'RYAN. It is, very.

Senator CHAMBERLAIN. So that there ought to be some power lodged somewhere in cases where there are individual hardships or wrongs, if you please, to review and to inspect the record that is made, with the view of correcting it.

Gen. O'RYAN. In respect to that last point, Senator, I might say that I approached the service on this board with quite an open mind, and we looked into the statistics, which are not at my tongue's end now; but I was more concerned in finding out, not whether Pvt. Smith was almost shot, in an army of three and one-half million men, but what percentage of the vast number of court-martial cases had resulted in injustice; and my belief is, from the statistics given, that

the percentage is very, very small. I believe it is less than in civil life.

Senator CHAMBERLAIN. That may be true, but in civil life there is a final tribunal where errors can be corrected. There is none in the court-martial system.

Now, pardon me—for the record—although it is insisted by Gen. Crowder and by the Secretary of War, and has been insisted by some of the military men of the Judge Advocate General's office, that the system is all right, yet there have been 322,000 cases of summary trials, and over 20,000 cases of general courts-martial, with an aggregate sentence in the latter of 28,000 years. If this system was correct, if it was fundamentally right, and wrongs could not be perpetrated under it, there would have been no need to have reduced these sentences; and yet out of 28,000 years in the aggregate, in 4,000 general court-martial cases they have remitted all but about 6,700 years. There is something wrong somewhere where there is a remission of such a great number of years in sentences.

Gen. O'RYAN. I think there is a point that explains that, to some extent. When our Army was formed there existed, as I explained before, this sentiment of "in terrorem." There did exist that sentiment. That explains, in part, the infliction of these really absurd sentences.

The next point is this, that a great number of divisions were created. Prior to the commencement of this war I think there were in the United States of America but perhaps three divisions in the Regular Army and the Guard together. In other words, there were but three divisions where division courts-martial—general courts—had ever operated.

Then the only other people who had had any experience in general courts-martial were the department commanders, because they were vested with court-martial jurisdiction; and of course that included the Philippines. I think that at McPherson and Leavenworth they have general court-martial jurisdiction. But the number of Army officers with experience in reviewing general-court cases was comparatively small; and in most cases they were the senior officers of the Army, many of whom were considered too old to take command of divisions in this war. The result was that a great number of officers from the Regular Army were made division commanders, and practically none of them had had any experience as reviewing officers in relation to general courts-martial. They were, by virtue of that lack of experience, principally concerned with organization, training, and getting their property, and I can well imagine that when the judge advocate handed them the results of general court-martial proceedings, they adopted an attitude quite different from what they would have adopted if they had had long experience prior to that time in the administration of justice. Otherwise, I think that many of the really absurd sentences should have been modified and reduced right there by the division commanders.

Senator CHAMBERLAIN. But they were not.

Gen. O'RYAN. But they were not.

Senator CHAMBERLAIN. And they could not be, according to the Judge Advocate General's ruling here, for want of jurisdiction.

Gen. O'RYAN. Except by Executive clemency.

Senator CHAMBERLAIN. Yes; except by Executive clemency. And you know, General, you take a young man in a criminal court—and I have had a good deal of experience in prosecuting—and he is convicted, and if the court sets aside the verdict for lack of proof, he goes free. If the conviction was allowed to stand, he was convicted just the same, and he had to have clemency exercised in his behalf by the Government.

Now, in the Army where these young men have been convicted and sentences have been rendered against them, they are criminals just the same in the eyes of the law.

Gen. O'RYAN. I am in accord with you about the insufficiency of justice which merely relieves the man of the necessity of serving in a prison somewhere, and leaves upon him the stigma of conviction.

Senator CHAMBERLAIN. I think if you and I were to sit down to consider this, we would not differ about the administration of justice. You had the civilian touch when you went in, and you were the only man that went in who had that. You had the civilian touch, and you knew it better than the average military man; so that you have resorted, according to your own statement, to punishing your men within your own organization. I think it was a splendid thing to do.

Gen. O'RYAN. Of course, that did not apply to all cases. It applied to many of them.

Senator CHAMBERLAIN. It had a wholesome effect.

Gen. O'RYAN. Yes; it had a wholesome effect because it was a terrible punishment.

Senator CHAMBERLAIN. It had a good effect in regard to discipline?

Gen. O'RYAN. It stopped the offense. We had no stragglers or shirkers. The punishment was pretty severe.

Senator CHAMBERLAIN. Yes. These Articles of War of ours were the articles that were in vogue in Great Britain in 1794?

Gen. O'RYAN. In a general way.

Senator CHAMBERLAIN. Well, as a matter of fact, the British articles of 1794 were adopted by the Continental Congress.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Practically without change, except to put in the word "Congress" where the word "King" occurred?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Those Articles of War have been changed very little, fundamentally, up to the present time. The British code has been changed to conform to more modern conditions, has it not?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. And yet our country has clung to the old British system?

Gen. O'RYAN. Yes; that is true.

Senator CHAMBERLAIN. Now, Mr. Chairman, may I insert something in the record here?

Senator WARREN. Before you do that, will you follow your line of examination by getting the opinion of Gen. O'Ryan upon the efficiency of the British system as now in practice, and perhaps the French and the Italian?

Senator CHAMBERLAIN. I will in a moment, if you will let me offer this.

Senator WARREN. Certainly.

Senator CHAMBERLAIN. I want to get this in. Under the administration of military justice in Great Britain the judge advocate general is different from the Judge Advocate General here. I suppose you are familiar with the British system?

Gen. O'RYAN. I am only familiar with it in an indirect way. We lived in the British section, but we were, as you know, pretty well occupied, and I really do not claim to have studied the British system. My information and knowledge of it is based upon casual conversation very largely.

Senator CHAMBERLAIN. The judge advocate general is entirely separated, as I recall it now, from the army. He is the legal adviser?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. And the judge advocates of the army, with the army, are legal advisers and see that the courts adhere to the recognized rules of evidence. Now, that has all been done in England. They have gotten away from the old court-martial system of 1794. Originally in England the judge advocate's duties were in England as they are now in America, assimilated to those of the prosecutor. That is what the judge advocate is in America?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. The judge advocate general in England was relieved of his duty as prosecutor in 1829, and in 1829 he became a quasi judicial officer, occupying the position of a legal adviser to the court, and they had to obey his observations as to the law. Did you observe its enforcement in the British Army?

Gen. O'RYAN. I never attended a court-martial in the British Army. I know that the discipline in the British Army was of a very high order; no question about it.

Senator CHAMBERLAIN. It was quite different from ours. I hope you will look that up, because you may possibly modify your views somewhat as contained in the Kernan report, because you will find that the judge occupies an entirely different position in the British Army.

Gen. O'RYAN. But have we not, Senator—I know it is not proper to ask the court questions——

Senator CHAMBERLAIN. Oh, yes; certainly.

Gen. O'RYAN. I mean by that, have we not, in what we recommend in relation to section 1199, of the Revised Statutes, or the corresponding articles, vested in the Judge Advocate General of the Army functions that will correct these shortcomings?

Senator CHAMBERLAIN. It will improve the condition over what it is now, but it does not go far enough, because the Judge Advocate General and his department, whether in the field or here, is still a prosecuting institution. Under the British system he is not the prosecutor nor the judge advocate in the field.

Gen. O'RYAN. The system includes, among its functions, one of prosecution. But I think that a proper conception of the Judge Advocate General's department which will result from an amendment based upon that report, is really that the department will have three functions. One class of officers will be prosecuting attorneys. Another group will be consulters and advisers. They constitute the group assigned to the divisions. Then there is a judicial group

back in Washington, or with the expeditionary force, which receives and revises the records of trials, and in the name of the President takes action thereon.

Senator CHAMBERLAIN. No; but without power now.

Gen. O'RYAN. Yes; I am speaking now——

Senator CHAMBERLAIN. About your proposal?

Gen. O'RYAN. Yes; the proposal.

Senator CHAMBERLAIN. Mr. Chairman, may I put in the record this matter in regard to the British system? I may say that it is prepared by the legislative reference bureau of the Library of Congress.

Senator WARREN. Let that be inserted.

(The matter referred to is here printed in full in the record, as follows:)

ADMINISTRATION OF MILITARY JUSTICE IN GREAT BRITAIN.

THE JUDGE ADVOCATE GENERAL'S DEPARTMENT.

The office and duties of the judge advocate general in England are described by the Encyclopedia Britannica as follows:

"The judge advocate general is an officer appointed in England to assist the Crown with advice in matters relating to military law, and more particularly as to courts-martial. In the army the administration of justice as pertaining to discipline is carried out in accordance with the provisions of military law, and it is the function of the judge advocate general to insure that these disciplinary powers are exercised in strict conformity with that law. Down to 1793 the judge advocate general acted as secretary and legal adviser to the board of general officers, but on the reconstruction of the office of commander in chief in that year he ceased to perform secretarial duties, but remained chief legal adviser. He retained his seat in Parliament and in 1806 he was made a member of the government and a privy councillor. The office ceased to be political in 1892, on the recommendation of the select committee of 1888 on army estimates, and was conferred on Sir F. Jeune (afterwards Lord St. Helier). There was no salary attached to the office when held by Lord St. Helier, and the duties were for the most part performed by deputy. On his death in 1905, Thomas Milvain, K. C., was appointed, and the terms and conditions of the post were rearranged as follows: (1) A salary of £2.000 a year; (2) the holder to devote his whole time to the duties of the post; (3) the retention of the post until the age of 70, subject to continued efficiency, but with claim of gratuity or pension on retirement. The holder was to be subordinate to the secretary of state for war, without direct access to the sovereign. The appointment is conferred by letters patent, which define the exact functions attaching to the office, which practically are the reviewing of the proceedings of all field general, general, and direct courts-martial held in the United Kingdom, and advising the sovereign as to the confirmation of the finding and sentence. The deputy judge advocate is a salaried officer in the department of the judge advocate general and acts under his letters patent. A separate judge advocate general's department is maintained in India, where at one time deputy judge advocates were attached to every important command. All general courts-martial held in the United Kingdom are sent to the judge advocate general, to be by him submitted to the sovereign for confirmation; and all districts courts-martial, after having been confirmed and promulgated ,are sent to his office for examination and custody. The judge advocate general and his deputy, being judges in the last resort of the validity of the proceedings of courts-martial, take no part in their conduct; but the deputy judge advocates frame and revise charges and attend at courts-martial, swear the court, advise both sides on law, look after the interest of the prisoner, and record the proceedings. In the English Navy there is an official whose functions are somewhat similar to those of the judge advocate general. He is called counsel and judge advocate of the fleet."

JUDGE ADVOCATE NOT A PROSECUTING OFFICER.

(*a*) *English compared with American procedure.*—The distinction in this respect between the duties of the judge advocate in England and in the United States is emphasized as follows in a leading American military encyclopedia:[1]

The official duties of a judge advocate during a trial by court-martial or military commission, or examination by a court of inquiry, are as follows: Preparation of the case for the prosecution, procuring of witnesses, administering the oath, opening the case for the prosecution with the necessary argument, questioning the witnesses, and submitting the case to the court. But besides these duties the judge advocate has still another—seemingly anomalous in this connection—that of protecting the witness from improper or leading questions, and to that extent also acting as counsel for the accused. In the English military service the duties of the judge advocate have been so far modified that he does not act as prosecutor, but solely in his advisory capacity in connection with the court, and as the recorder of its proceedings.

(*b*) *The provisions of law.*—The prohibition against the judge advocate's acting as prosecuting officer is contained in the Army act, §50 (3):

Any of the following persons, that is to say a prosecutor or witness for the prosecution of any accused * * * shall not * * * act as judge advocate at such court-martial.

And the Rules of Procedure, §103 (H), expressly prescribe that—

In fulfilling his duties the judge advocate will be careful to maintain an entirely impartial position.

It would appear, indeed, that greater care is taken, under the English law and practice, to protect the defense from possible bias on the part of the judge advocate, than to protect the prosecution. For the judge advocate is permitted to testify in favor of the accused, as a witness, but not in favor of the prosecution.[2]

(*c*) *Originally a prosecuting officer.*—The judge advocate's duties were originally in England, as they still are in America, assimilated to those of prosecutor. Until the middle of the eighteen century the judge advocate had to appear as informer and prosecutor before the "Marshall's" Court, i. e., the court of the military chief or hierarch against whose rules the accused had offended. He was relieved of his duties as informer in 1742, and as prosecutor in 1829.[3]

DUTIES OF JUDGE ADVOCATE AT COURTS-MARTIAL.

(*a*) *Quasi-judicial in character.*—The judge advocate's duties at courts-martial are not technically judicial, and he is forbidden[4] to sit on the court-martial as one of the judges, save in the case of a field general court-martial, i. e., an emergency court-martial among forces overseas or on active service.[5] His duties are advisory, but they partake of a judicial character, inasmuch as his summing up of the evidence and statement of the law at the conclusion of a case[6] are similar in their purpose and in the weight which they have with the court, to a judge's charge to a jury.[7]

(*b*) *As defined by the Rules of Procedure.*—According to the Rules of Procedure[8] under the Army act, the powers and duties of a judge advocate are as follows:

1. The prosecutor and the accused respectively are at all times after the judge advocate is named to act on the court, entitled to his opinion on any question of law relative to the charge or trial, whether he is in or out of court, subject, when he is in court, to the permission of the court.

2. At a court-martial he represents the judge advocate general;

3. He is responsible for informing the court of any informality or irregularity in the proceedings. Whether consulted or not, he will inform the convening officer and the court of any informality or defect in the charge, or in

---

[1] Farrow, Edward S., U. S. A., Military Encyclopedia, in 3 vols., New York, 1885, v. 2, p. 145–6.
[2] Gt. Brit, War Office, Manual of Military Law, 1914, p. 430, note.
[3] Clode, C. M., The administration of justic under military and martial law. London 1872, p. 105–6.
[4] Army act, §50 (3).
[5] Ibid, §49.
[6] After the judge advocate has summed up the case to the court, no other address is allowed.—Rules of Procedure, §42 (In Manual of Military Law).
[7] Cf. Manual of Military Law, p. 597, note.
[8] Rules of Procedure, §103.

the constitution of the court, and will give his advice on any matter before the court.

4. Any information or advice given to the court on any matter before the court will, if he or the court desire it, be entered in the proceedings.

5. At the conclusion of the case he will, unless both he and the court consider it unnecessary, sum up the evidence and give his opinion upon the legal bearing of the case before the court proceed to deliberate upon their finding.

6. Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not overrule it, except for very weighty reasons. The court are responsible for the legality of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the judge advocate on any legal point. The court, in following the opinion of the judge advocate on a legal point, may record that they have decided in consequence of that opinion.

7. The judge advocate has, equally with the President, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such, or of his ignorance or incapacity to examine or cross-examine witnesses or to make his own evidence clear or intelligible, or otherwise, and may, for that purpose, with the permission of the court, call witnesses, and put questions to witnesses, which appear to him necessary or desirable to elicit the truth.

The judge advocate is also responsible for keeping a record of the proceedings of the court-martial and transmitting the same to the judge advocate geneneral.[1]

COUNSEL OR FRIEND OF THE ACCUSED.

(*a*) *Distinction between rights of counsel and of friend.*—The accused is entitled to have any person whom he may designate present to advise him during the court-martial. If such persons is neither a lawyer (barrister or solicitor) nor an officer subject to military law, he may only advise the accused and suggest questions to be put by the latter to witnesses; but if he is a lawyer or military officer, he has the same right as to addressing the court, examining witnesses, etc., as the accused. He represents the accused, addresses the court, and examines witnesses in his stead. This does not, however, preclude the accused from making a statement in his own defense; and as such statement the accused can be neither sworn nor cross-examined.[2]

(*b*) *Modifications outside of United Kingdom.*—Whereas the accused is entitled to have a friend or military officer advise him in the case of any court-martial whatsoever,[3] his right to legal counsel, i. e., to having a barrister or solicitor represent him, is, in the case of courts-martial held elsewhere than in the United Kingdom, dependent on the approval of the Army Council or the convening officer.[4]

(*c*) *Rules governing counsel.*—The general rules as to the duties and privileges of counsel, whether for the accused or for the prosecution, are the same as in the civil courts, except where these conflict with the military rules of procedure.[5]

(*d*) *Counsel for prosecutor.*—Counsel is sometimes engaged on behalf of the prosecutor. If this is done notice of it must be given to the prisoner at least seven days before the trial, in order that he may avail himself of the privilege of engaging counsel to defend him.[6]

PROVISIONS FOR APPEAL OR REVIEW BY HIGHER AUTHORITY.

(*a*) *By higher military authority*—(1) *Acquittal not subject to review.*—The acquittal of an accused person by a court-martial is final, and can not be questioned or revoked by any authority whatsoever.[7]

(2) *Conviction must be confirmed.*—In the case of a conviction, finding and sentence are not valid until confirmed by superior authority.[8] Who the confirm-

[1] Pratt, Maj. S. C., Military Law, London, 1887, p. 52; Rules of procedure, § 95 ff.
[2] FitsGerald, G. A. R., Courts-Martial, in Manual of Military Law, 1914, p. 46.
[3] Rules of Procedure, §87.
[4] Ibid, §88.
[5] Ibid, §92.
[6] Pratt, op. cit., p. 49.
[7] FitsGerald, G. A. R., op. cit., p. 51; Army act, § 54 (3).
[8] Ibid., p. 51; Army act, § 54 (6).

ing authority in a given case shall be is determined by the nature of the court-martial, as follows:[1]

Regimental court-martial: This is a court-martial which may not try officers, may not impose a heavier punishment than 42 days' detention, and may not sentence a soldier to dishonorable discharge. The confirming authority is the officer who convened the court-martial or had authority to convene at the time of the submission of the proceedings.

District court-martial: This is a court-martial which may not try officers and may not impose a heavier sentence than two years' imprisonment. The confirming authority is an officer authorized to convene general courts-martial or the delegate of such officer.

General court-martial: This is the only kind of court-martial which may try an officer or award sentences of penal servitude or death. The confirming authority is the Crown or an officer deriving authority directly or indirectly from the Crown. Such authority is not usually given in the warrant issued by the Crown authorizing an officer to convene general courts-martial, when such officer commands in the United Kingdom; hence general courts-martial held at home usually require the confirmation of the Crown. Such authority is ordinarily given in the warrant when the officer commands abroad.

But even in that case there are certain limitations: The finding and sentence whereby a commissioned officer is sentenced to death, penal servitude, cashiering, and dismissal are expressly reserved by the warrant for confirmation by the Crown, except where the officer is the commander in chief in India or (sometimes) where he is commander in chief on active service, in which cases the power of confirmation is granted without reservation.[2]

(3) *Effect of nonconfirmation or mitigation, etc., of sentence.*—The confirming authority may order a revision only once, only by the same court which gave the finding and sentence, and without additional evidence being taken. The court may not increase the sentence, but may decrease or do away with it. If the court adheres to it, the confirming authority may, by again refusing to confirm, either annul the whole proceedings, or, if he so elects, refer them for confirmation to a superior authority. Or he may confirm and then mitigate, remit, commute, or suspend the punishment; this he is also at liberty to do before revision, the first time the finding and sentence are submitted to him for confirmation.[3]

(4) *Power of King or army council to mitigate, etc., punishment.*—After confirmation, punishment may be mitigated, remitted, or commuted in the United Kingdom by the King or army council, outside the United Kingdom by either of these authorities or by either the commander in chief of the forces in India (if the court-martial was held in India), or the officer commanding the forces in whatever other place court-martial was held.[4] The right of officers or soldiers to appeal to the said authorities for such mitigation, remission, or commutation of their sentence is guaranteed them by § 42 and § 43 of the Army act.[5]

(*b*) *By courts of law*—(1) *Only where jurisdiction is questioned.*—The law courts have power over the officers or members of courts-martial only in cases in which such officers or members have, in conducting the court-martial, acted without jurisdiction or exceeded such jurisdiction as they have had.

In addition to lack of jurisdiction and exceeding jurisdiction, there is one other ground for the interference of a civil court, with power to annul the verdict of a court-martial and to award damages. This is where jurisdiction is exercised with cruelty or oppression amounting to abuse of it. The power to punish granted by martial law does not include the power to punish barbarously, nor with undue severity. In such cases the officer's excuses for his action—military jurisdiction—is said to be extinguished "by reason of the excess in the mode of exercising it."[7]

(2) *Procedure to prevent execution of sentence.*—In cases of this sort, though the writ of prohibition would technically lie, no case is on record where it has been successfully used. The customary procedure is to apply for a writ

---

[1] FitzGerald, G. A. R., op. cit., p. 51; Army act, § 54 (1).
[2] FitzGerald, pp. 52-53.
[3] Ibid; Army act, § § 54, 57.
[4] FitzGerald, p. 52-53; Army act. § § 54, 57.
[5] Blake, Lt. Col. R. M. L. I., and FitzGerald, G. A. R., Powers of courts of law in relation to courts-martial and officers, Manual of Martial Law, 1914, p. 138.
[6] Ibid, pp. 120-146.
[7] Ibid., p. 121.

of certiorari—but there is granted only where, in addition to lack of jurisdiction on the part of the court, some civil, as distinct from a purely military, right of the accused is at issue—or for a writ of habeas corpus, which will issue only if a particular formality necessary for the court-martial or other military authority to follow has been neglected.

(3) *Suit for damages.*—In addition to the above methods for preventing the infliction of punishments illegally decreed by court-martial, the person who regards himself as injured by a court-martial may sue individual officers associated with it or with the infliction of punishment for damages.

(4) *Criminal prosecution of officers exceeding jurisdiction.*—An officer who has punished a person in a case in which the court-martial had no jurisdiction is, moreover, criminally responsible. If the punishment in question was the death penalty, the officer is liable to a prosecution for murder.

(5) *Certain immunities of officers, members of courts-martial, etc.*—It is, however, provided in the Army act that no action, prosecution, etc., may be brought against any person for alleged misconduct, etc., done in his military capacity, unless it is begun within six months after the alleged offense; and that the trial must be held in a superior court.[1]

POWERS OF COMMANDING OFFICER IN RELATION TO DECISIONS OF COURTS-MARTIAL.

(*a*) *May not sit on court-martial.*—The commanding officer of the accused is in all cases disqualified from sitting on the court-martial.[2]

(*b*) *May not punish if court-martial has passed on the offense.*—In those cases (involving minor offenses) in which the accused has the right to choose between being dealt with summarily by the commanding officer or being court-martialed; if he chooses the latter, conviction or acquittal by the court-martial prevents the commanding officer from punishing him for the offense.[3]

(*c*) *May commit to prison, etc., after court-martial has sentenced.*—If the court-martial passes, in the United Kingdom, sentence of detention or imprisonment, the commanding officer may be the authority who commits to prison; and if he is so, he may also be the discharging or removing authority.[4]

(*d*) *Powers as convening officer*—(1) *May not influence decision.*—The commanding officer has power to convene regimental courts-martial.[5] When he does so, however, it raises no presumption of guilt as to the accused, and the members of the court-martial are expected to be influenced in their decision by his supposed views or desires on the subject.[6]

(2) *As confirming authority, may lessen, etc., the penalty.*—Since the convening authority is, in the case of regimental courts-martial, also the confirming authority, all that has been said above regarding the confirmation of finding and sentence applies to the commanding officer in such cases—i. e., he can not affect a finding or sentence unfavorable to the interests of the accused, but he may, through his power to order a revision, or through his power to mitigate, remit, commute, or suspend punishment, affect find or sentence favorably to the interests of the accused.

Senator CHAMBERLAIN. Now, General, take this kind of a case. Have you seen the trial of a case where, we will say, there are four defendants who are accused of participation in the commission of the same crime. The defendants conclude to sever in their trials. The court at once tries one of them, they find him guilty, and the same court then tries each of the others, does it not?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Do you think the other three can possibly have a square deal when the court has already found one guilty?

Gen. O'RYAN. I think the answer must be that there is a greater chance of conviction than acquittal in the case of the others.

---

[1] Army act § 170.
[2] Rules of Procedure § 19 B (4).
[3] FitzGerald, G. A. R., arrest, etc., Manual of Military Law, 1914, p. 33.
[4] Army act, § 64.
[5] Ibid., § 47.
[6] FitzGerald, Courts-martial, p. 46.

Senator CHAMBERLAIN. It may be—I will assume it for the purposes of the illustration—that there was an insufficiency of evidence in the first case, or that rules of evidence have been violated, and yet the same irregularities would come into the other three cases.

Gen. O'RYAN. Very probably; but that would not inevitably follow.

Senator CHAMBERLAIN. Yes; but it would very naturally follow; do you not think?

Gen. O'RYAN. Very naturally, especially if the same judge advocate and the same president of the court tried all cases.

Senator CHAMBERLAIN. Now, speaking of your report, I have read it with some interest, but not as critically as I hope to be able to read it. The amendments proposed by the Kernan report make no really fundamental changes, do they?

Gen. O'RYAN. I think from what you have said, Senator, that you think the vital point—and I have thought that the vital point—of the whole system is to provide somewhere a body of trained men whose authority under the law would be adequate to correct errors of law and all injustices in relation to courts-martial.

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. Now, in providing that, we considered this: Shall we make this court or body an appellate tribunal composed of lawyers to be appointed by the President? Shall we constitute it of officers detailed specially to constitute that court and to remain permanently on duty as members of that court, free from any superior authority? Or shall we provide that that body shall consist of officers in a department already existing, who shall act in an advisory capacity and in a recommendatory way? We concluded, first, to consider the matter from the constitutional point of view, and you perhaps remember that in the opening part of our report we discussed that question. I know that some members of the court were of the opinion that it might be unconstitutional for Congress to attempt to take from the President, in his rôle of Commander in Chief, the power to carry out the discipline of the Army through the agency of the courts.

We decided to merely raise that point for what it might be worth and to consider the matter aside from any constitutional point of view. We came to the conclusion that by amending the existing law we could vest in the Judge Advocate General's Department the authority to do—in the name of the President as Commander in Chief—those things which the Senator has mentioned and which are certainly desirable to have done in order to insure justice to officers and men who are tried. I think we have accomplished that, if that is the real meat of this needed reform.

Senator CHAMBERLAIN. That is one of the most serious things, General.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Now, I am frank to say that I was amazed at the constitutional argument of your committee. For instance, you in effect hold that the functions which the King exercised as the Commander in Chief of the Army prior to 1794 descended to the President of the United States; in other words, that as Commander in Chief of the Army before the Constitution was adopted he inherited certain fundamental powers.

Gen. O'RYAN. I do not join in that part of the argument, if that argument was made.

Senator CHAMBERLAIN. That is made.

Gen. O'RYAN. Yes?

Senator CHAMBERLAIN. I am going to call your attention to it just because I think it is fundamentally wrong, General. I am discussing it from a lawyer's standpoint.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Now, if that be true, the powers which the President inherited over our Army as the successor of a King in the Colonies, at least after the adoption of the Constitution, could be taken away by Congress, because the Constitution gives to Congress all power to make rules and regulations for the government of the Army, does it not?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Now, let me ask you if that does not follow from what your report contains? Mr. Chairman, I will not read it all, but may I ask to have this inserted in the record?

Senator WARREN. Certainly.

Senator CHAMBERLAIN. I will read from page 6 of this report, and I will mark the part which I want to be inserted in the record, and I have misconstrued the findings of your committee unless what I have just stated is correct. [Reading:]

The rules governing armies had their beginnings not in legislative bodies but in commanders, whether called kings or chiefs or generals, and in early times those who formulated the rules carried them out. With the evolution of governments the right of prescribing the most important or fundamental rules has lodged in legislative bodies, but the execution of those rules, their practical administration, has heretofore been left to commanders and their assistants down through the hierarchy of command to the very bottom. Courts-martial have always been agencies for creating and maintaining the discipline of armies, and in earlier times, and certainly until the adoption of our Constitution, were provided and administered by commanders as of inherent right. The King of England had and exercised this inherent right. The Continental Congress took over some of the duties of government in the rebellious colonies, but Washington, as Commander in Chief, appointed courts-martial as of right inherent in that office, without the express authority of that Congress. So that when our Constitution was adopted and the powers of the Federal Government were distributed among three great departments, and the President was made by the organic law Commander in Chief, the power to appoint courts-martial by virtue of that office was well understood. The power to make rules for the government of the land forces was at the same time confided to Congress. The earlier Articles of War continued or created under that grant of power did not expressly confer upon the President the right or authority to appoint courts-martial, but actually he exercised the power, and the validity of that action is well established. It appears, therefore, that before our Constitution was established a Commander in Chief was inherently competent to appoint courts-martial as incident to his office; that under the Constitution this right has been exercised and upheld, and, further, that the rules made for the Army by Congress have extended to subordinate commanders (who are, in fact, assistants to the President in his special capacity as Commander in Chief) the right to appoint and to make use of this agency.

The pending Chamberlain bill proposes to take out of the hands of those to whom command is confided, from the President down, the effective use of courts-martial as instruments to enforce discipline. It does this by providing a civilian court of military appeals and by injecting into the principal courts-martial a new functionary with powers so extensive and of such a kind as to constitute him the administrator of discipline, though he is not himself of the hierarchy of command. The net result in the more important cases would

be to transfer the power to discipline our armies from the Commander in Chief, the President, and from his assistant commanders to civilian hands pure and simply, i. e., the court of military appeals, or to the quasi civilian legal hands of the judge advocates provided for general and special court-martial. In view of the history of the court-martial as an adjunct of armies and as an instrument the use of which inheres in the office of the Commander in Chief under our system of government, is it not possible that the proposition to take from the President in large measure the effective use of this instrument, as well as to take away from his proper assistants in the task of command a like use of the same instrument may be unconstitutional? It is not in effect an attempt to withdraw from command an essential part of that which belongs to it historically and in sound reason? Is it not open to be questioned as an attempt by law to emasculate the legitimate and heretofore undisputed authority of the President as Commander in Chief?

Senator CHAMBERLAIN. The logical conclusion to be drawn from that to me is that Congress has no power to do that.

Gen. O'RYAN. That was what was intended to be conveyed by the raising of that point. But I see nothing in what the Senator has read, or quoted, that indicates that the board thought that the President derives any of his powers from a King of England.

Senator WARREN. He has his powers under the Constitution.

Gen. O'RYAN. Yes; and in part he derives them from the customs of war, which may be termed the military common law. I do not recall anything that would indicate otherwise in the report.

Senator CHAMBERLAIN. It is, practically, that it is an inherent power.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. And the power that we have comes from the English articles of war of 1794, which vested this power in the King.

Gen. O'RYAN. Yes. The Constitution makes the President the Commander in Chief of the Army and the Navy, and the question then arises in relation to the performance of the President's functons, What are the functions of the Commander in Chief? They are not stated in the Constitution. We must go back of the Constitution to determine what the functions of the Commander in Chief are. They can only be determined by reference to the customs of war. What are those rights that are inherent in the office of commander in chief of an army?

Senator CHAMBERLAIN. I would say there are none, except as Congress gives them.

Gen. O'RYAN. Well, I was going to say the converse of that—that they are whatever the customs of war give, except as Congress may curtail them under its powers.

Senator CHAMBERLAIN. Well, possibly that is a correct statement of it, too.

Gen. O'RYAN. Then, of course, going on from there—well, assuming all that, has not Congress the power, in the exercise of its legislative power, to curtail the powers of the President as Commander in Chief.

Senator CHAMBERLAIN. I think there is no question about that power, under the general powers of the Constitution, which authorize the Congress to adopt rules and regulations.

Gen. O'RYAN. Rules and regulations?

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. The question is whether rules and regulations for the government of the Army would include a court of this character to govern, in the last analysis, the discipline of the Army.

Senator CHAMBERLAIN. Do you entertain the opinion that Congress can not curtail those powers?

Gen. O'RYAN. No; I refuse to do more than to put that in the interrogatory form.

Senator CHAMBERLAIN. You would not give that as your opinion?

Gen. O'RYAN. No; nor would I say that I might not reach that opinion. I merely stated it would take too long to consider that, and we preferred to get down to what we wanted to do.

Senator CHAMBERLAIN. Yes; I am glad you did that.

Gen. O'RYAN. We turned to the practical solution, which was to vest the authority to review, basically, in the President.

Senator CHAMRERLAIN. Getting back to this question—if I am not tiring you, General——

Gen. O'RYAN. No, indeed.

Senator CHAMBERLAIN (continuing). Getting back to the question of enlisted men serving on courts; you know that the Army we had in France was a slice taken out of the civil life.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. It is representative of the whole country.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Take a man on trial in a civil court; the jury that tries him is taken from the body of the same class of citizens from which the Army was taken?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Do you not think that men taken from the Army would be just as competent to sit in judgment upon a charge against a young man as would a jury under ordinary circumstances taken from the same body of citizens?

Gen. O'RYAN. Frankly, I do not, Senator. Whatever may be said in relation to the previous question, I have a firm conviction that that thing is wholly impracticable and undesirable in the Army.

Now, let me say this: The slice that comes out of our civil life in the United States undergoes a tremendous change before it goes into battle. I think it is one of the most interesting things about the development of an army to note the change that takes place in the personnel. There are men in the Army who are blacksmiths, mechanics, laborers, clerks, artists; everything. Nevertheless, in the Army they become in a measure children, due to the manner of the life they are leading. It is all regulated for them. They get their meals at regulated times; they eat what is put before them; they have no choice. They go to bed at a certain time. They never know what they are going to do in the next 24 hours. They may be marched to the front or marched to the rear, or they may go for a rest, go on leave on pleasure bent somewhere. That manner of life has a tremendous psychological influence upon those men. I know men in my own division who in civil life were men of affairs, although they were private soldiers, men who for one reason or another did not care for commissions, but that served as private soldiers throughout the war. They all underwent the same process of psychological change after they had been in the Army for a while; and I think

to that extent, just as they became as children are, so their efficiency to serve as jurors would be adversely affected, due to the narrow life that they must necessarily lead.

Senator CHAMBERLAIN. Would not that same argument apply to all of the officers below the commanding officer of a regiment, say, or the commanding officer of a division? The lieutenants do not know one day what they are going to do the next.

Gen. O'RYAN. No; but, as you know, there is a big difference in the character of the work performed by a soldier—necessarily so—in an army, and the character of work that is performed by those who supervise and control and direct. I think, as a matter of fact, that it would be desirable to have as members of a court only those officers who are mature and experienced. But that is not always practicable. There are not enough of those men present or available to completely compose courts. But I think that putting the enlisted men on the courts would be undesirable. Besides, I have never heard any soldiers express the desire or the view that such practice would be desirable from the standpoint of their own interests.

Senator CHAMBERLAIN. Mr. Chairman, I believe that is all that I care to ask the general.

Senator WARREN. Does anything else occur to you that you would like to add to your testimony, General?

Gen O'RYAN. No, sir; I think not.

(Thereupon, at 12.30 o'clock p. m., the subcommittee adjourned, subject to the call of the chairman.)